

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

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FILED  
TAMPA, FLORIDA

UNITED STATES OF AMERICA

v.

CASE NUMBER: 8:03-CR-77-T-30TBM

HATIM NAJI FARIZ  
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**DEFENDANT HATIM NAJI FARIZ'S MOTION TO STRIKE AS SURPLUSAGE  
PARAGRAPHS 43(236), (240), (247), AND (253) OF THE INDICTMENT, AND TO  
DISMISS COUNTS 35, 37, 41, AND 43 OF THE INDICTMENT**

Defendant, HATIM NAJI FARIZ, by and through undersigned counsel, respectfully moves this Honorable Court to strike as surplusage Paragraphs 43(236), (240), (247), and (253) of the Indictment, pursuant to Federal Rule of Criminal Procedure 7(d), and to dismiss Counts 35, 37, 41, and 43 of the Indictment, pursuant to Federal Rule of Criminal Procedure 7(c)(1), and states the following:

- 1) On February 19, 2003, the Grand Jury returned its indictment against Mr. Fariz.
- 2) Counts 35, 37, 41, and 43 of the Indictment, among others, charge Mr. Fariz with violating 18 U.S.C. §§ 1952(a)(2) and (3), and 18 U.S.C. § 2.
- 3) Other than the incorporation of Part A of Count One of the Indictment ("Introduction"), Paragraph 43(253) of the Indictment constitutes the sole basis for Count 43, and reads as follows:

On or about November 10, 2002, HATIM NAJI FARIZ, who was in the Middle District of Florida, had a telephone conversation with ABD AL AZIZ

AWDA, who was outside the State of Florida. They discussed a variety of issues about fundraising and distributing money. HATIM NAJI FARIZ and ABD AL AZIZ AWDA discussed HATIM NAJI FARIZ sending ABD AL AZIZ AWDA money; however, HATIM NAJI FARIZ was concerned that the name of ABD AL AZIZ AWDA's organization was a security concern in the United States. As a result, HATIM NAJI FARIZ instructed ABD AL AZIZ AWDA to change its name to be wary of informants and to compartmentalize information. HATIM NAJI FARIZ then said he had begun to use a shell organization he had established but not used for several years. ABD AL AZIZ AWDA then offered to give HATIM NAJI FARIZ the bank account number of his society; however, HATIM NAJI FARIZ refused and said he would send the money via the normal transfer.

4) The government has conceded that Paragraph 43(253) of the Indictment incorrectly identifies Mr. Adwa. (Doc. 71)

5) Because of the misidentification of Mr. Awda, the allegations in Paragraph 43(253) are immaterial and irrelevant, and will cause prejudice to Mr. Fariz.

6) Should the Court strike Paragraph 43(253), there will be no allegation in the Indictment to support Count 43. Although the government may take the position that Mr. Fariz was talking to "another PIJ activist," Mr. Fariz urges this Honorable Court to find (with respect to not only Paragraph 43(253), but also Paragraphs 43(236), (240), and (247)) as Magistrate Judge Mark A. Pizzo found in rejecting the government's motion to detain Mr. Fariz: "... I have no confidence Fariz is discussing PIJ business as the government claims, especially in view of the nebulous identification of the other person in the intercepts." (Doc. 74, p. 16)

7) Other than the incorporation of Part A of Count One of the Indictment ("Introduction"), Paragraph 43(236) of the Indictment constitutes the sole basis for Count 35,

and reads as follows:

On or about May 26, 2002, HATIM NAJI FARIZ, who was in the Middle District of Florida, had a telephone conversation with ABD AL AZIZ AWDA, who was outside the State of Florida. ABD AL AZIZ AWDA said that "Sheik Ahmad's" group (HAMAS) was taking all the donations of the organizations. HATIM NAJI FARIZ then complained that people in Florida were stingier than those in Chicago; although Floridians have good incomes, they are suspicious about who receives the funds. ABD AL AZIZ AWDA quickly responded that the funds were for "the poor people," and asked HATIM NAJI FARIZ if the amount he sent last time was \$4,500.00 or \$4,700.00" [sic] HATIM NAJI FARIZ said he wasn't sure but thought it was \$4,000.00.

8) The government has conceded that the identification of Mr. Awda in Paragraph 43(236) of the Indictment is "suspect" based upon the government's mis-identification of Mr. Awda in another telephone conversation recounted in Paragraph 43(253). (Doc. 71)

9) Because of the "suspect" identification, the allegations in Paragraph 43(236) are immaterial and irrelevant, and will cause prejudice to Mr. Fariz.

10) Should the Court strike Paragraph 43(236), there will be no allegation in the Indictment to support Count 35. As stated by Magistrate Judge Mark A. Pizzo, in rejecting the government's motion to detain Mr. Fariz: "Now, Fariz's discussion on May 26, 2002, (overt act 238), can reasonably be interpreted as one about acquiring donations for legitimate Palestinian charities." (Doc. 74, p. 16)

11) Other than the incorporation of Part A of Count One of the Indictment ("Introduction"), Paragraph 43(240) of the Indictment constitutes the sole basis for Count 37, and reads as follows:

On or about June 7, 2002, HATIM NAJI FARIZ, who was in the Middle District of Florida, had a telephone conversation with GHASSAN ZAYED

BALLUT, who was outside the State of Florida, about a variety of issues, including problems at the IAF and that SAMI AMIN AL-ARIAN was considering resigning from the school. HATIM NAJI FARIZ said that SAMI AMIN AL-ARIAN and SAMEEH HAMMOUDEH and others had been accused of stealing money from the IAF. GHASSAN ZAYED BALLUT asked about the reaction of the community to the June 5, 2002 terrorist bombing. HATIM NAJI FARIZ said the situation was bad and that the media kept connecting the "incident" to the University of South Florida, SAMI AMIN AL-ARIAN and Unindicted Co-Conspirator Twelve. GHASSAN ZAYED BALLUT said that it was well organized and no one predicted it. HATIM NAJI FARIZ responded that the previous incident victimized Fathi Shiqaqi and this might get SAMI AMIN AL-ARIAN. HATIM NAJI FARIZ said that "they" could not make the bomb without all the ingredients. HATIM NAJI FARIZ then stated, "God protect them" and added that someone's first cousin was the one who made the bomb. HATIM NAJI FARIZ said that the group which made the bomb used to belong to the Popular Front for Liberation of Palestine but later joined the PIJ. HATIM NAJI FARIZ and GHASSAN ZAYED BALLUT spoke about supporting Unindicted Co-Conspirator Eleven and stated that they had transferred "seven" and "five" through ABD AL AZIZ AWDA and that ABD AL AZIZ AWDA had received the transfers smoothly.

12) The government has conceded that the identification of Mr. Awda in Paragraph 43(240) of the Indictment is "suspect" based upon the government's misidentification of Mr. Awda in another conversation recounted in Paragraph 43(253).

13) Because of the "suspect" identification, the allegations in Paragraph 43(240) are immaterial and irrelevant, and will cause prejudice to Mr. Fariz.

14) Should the Court strike Paragraph 43(240), there will be no allegation in the Indictment to support Count 37.

15) Other than the incorporation of Part A of Count One of the Indictment ("Introduction"), Paragraph 43(247) of the Indictment constitutes the sole basis for Count 41, and reads as follows:

On or about September 13, 2002, HATIM NAJI FARIZ, who was in the Middle District of Florida, had a telephone conversation with GHASSAN ZAYED BALLUT, who was outside the State of Florida. HATIM NAJI FARIZ said he had recently spoke with ABD AL AZIZ AWDA who thanked him for the money, although it was less than last year. GHASSAN ZAYED BALLUT said ABD AL AZIZ AWDA must realize that things had changed since last year. HATIM NAJI FARIZ also said that ABD AL AZIZ AWDA told him that RAMADAN ABDULLAH SHALLAH was in the hospital because of depression; however, it was kept quiet for security reasons. They then discussed that three PIJ members had recently been killed.

16) The government has conceded that the identification of Mr. Awda in Paragraph 43(247) of the indictment is “suspect” based upon the government’s misidentification of Mr. Awda in another conversation recounted in Paragraph 43(253).

17) Because of the “suspect” identification, the allegations in Paragraph 43(247) are immaterial and irrelevant, and will cause prejudice to Mr. Fariz.

18) Should the Court strike Paragraph 43(247), there will be no allegation in the Indictment to support Count 41.

#### **MEMORANDUM OF LAW**

Rule 7(c)(1) of the Federal Rules of Criminal Procedure states that an indictment “must be a plain, concise, and definite written statement of the essential facts constituting the offense charged ...” In addition, Rule 7(d) states: “Upon the defendant’s motion, the court may strike surplusage from the indictment or information.” The purpose of Rule 7(d) is to provide a “means of protecting the defendant against immaterial or irrelevant allegations in an indictment or information, which may, however, be prejudicial.” *Id.*, Note, to Subdivision (d).

The appropriate remedy for counts which contain prejudicial surplusage is a motion to strike the surplusage, rather than the dismissal of the indictment or a count within an indictment. *United States v. Goodman*, 285 F.2d 378, 379 (5<sup>th</sup> Cir.), *cert. denied*, 366 U.S. 930, 81 S. Ct. 1651 (1961).<sup>1</sup> The courts have recognized that the "inclusion of clearly unnecessary language in an indictment that could serve only to inflame the jury, confuse the issues, and blur the elements necessary for conviction under the separate counts involved surely can be prejudicial." *United States v. Bullock*, 451 F.2d 884, 888 (5<sup>th</sup> Cir. 1971). In *Bullock*, the court stated that in determining whether to strike language from an indictment, the court must determine whether the language is irrelevant, inflammatory, and prejudicial. *Id.* This approach was adopted by the Eleventh Circuit in *United States v. Huppert*, 917 F.2d 507, 511 (11<sup>th</sup> Cir. 1990). Furthermore, striking surplusage may be particularly appropriate where the government has no intention of proving the allegations at trial. *See, e.g., United States v. Hill*, 799 F. Supp. 86, 88-89 (D. Kan. 1992); *United States v. Wecker*, 620 F. Supp. 1002, 1007 (D. Del. 1985).

The government conceded at a hearing before Judge Pizzo on April 8, 2003, that the Indictment incorrectly identifies Mr. Awda in Paragraph 43(253), making the references to Mr. Awda in Paragraphs 43(236), (240), and (247) "suspect." *See* Trans. of Status Proceedings Before Hon. Mark A. Pizzo, April 8, 2003, at 3-7, 11-13. The admitted false

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<sup>1</sup> In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11<sup>th</sup> Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions handed down by the former Fifth Circuit before October 1, 1981.

identification of Mr. Awda in Paragraph 43(253) (which consequently makes the identification of Mr. Awda in Paragraph 43(236), (240), and (247) “suspect”) renders each paragraph immaterial and prejudicial. The misidentification of Mr. Awda renders these paragraphs immaterial because, in light of the government’s admission one can no longer conclude that Mr. Fariz had conversations with Mr. Awda, “a founder and the spiritual leader of the PIJ and a member of the governing Shura Council of the PIJ.” (Indictment, Paragraph 12). Furthermore, the inclusion of these paragraphs greatly prejudices Mr. Fariz in that the paragraphs incorrectly allege that he had telephone conversations with Mr. Awda, a top-ranking member of the PIJ who allegedly was involved in terrorists acts with which Mr. Fariz claims no involvement. Leaving these paragraphs in the Indictment will leave the jury with the incorrect perception that the government correctly alleged, and the grand jury believed, that Mr. Fariz had these conversations with Mr. Awda - which the government now admits is not true (Paragraph 43(253)), or is “suspect” (Paragraphs 43(236), (240), (247)). Such a misperception will be unfairly prejudicial to Mr. Fariz, and these paragraphs should therefore be stricken.

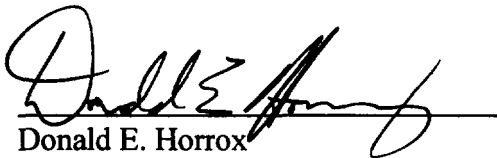
Should the Court strike Paragraphs 43(236), (240), (247), and (253) from the Indictment, it should subsequently dismiss Counts 35, 37, 41, and 43 of the Indictment. In order to sustain a conviction under 18 U.S.C. §§ 1952(a)(2) and (3), the government must prove that Mr. Fariz traveled in interstate or foreign commerce or used the mail or any facility in interstate or foreign commerce, with the intent to distribute the proceeds of unlawful activity or commit any crime of violence to further any unlawful activity. Other than

incorporating the background section of Count One, Counts 35, 37, 41, and 43 solely rely upon the allegations of Paragraphs 43(236), (240), (247), and (253), respectively. Without the above listed paragraphs, Counts 35, 37, 41, and 43 fail to provide "a plain, concise, and definite written statement of the essential facts constituting the offense charged," Fed. R. Crim. P. 7(c)(1), because the counts would allege no facts constituting the elements of 18 U.S.C. §§ 1952(a)(2) and (3). These Counts should therefore be dismissed.

WHEREFORE, Defendant requests that his motion be granted as stated.

Respectfully Submitted,

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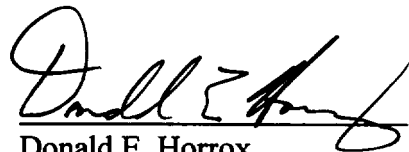
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 5<sup>th</sup> day of September, 2003, a correct copy of the foregoing has been furnished by hand delivery to Walter E. Furr, Assistant United States Attorney, 400 North Tampa Street, Suite 3200, Tampa, Florida 33602 and to the following by U.S. Mail:

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